UNITED STATES DISTRICT COURT
WESTERN DISTRICT OF VIRGINIA
Charlottesville Division

DAMIAN STINNIE, et al., Civil No. 3:16cv00044

Plaintiffs,

vs. Charlottesville, Virginia

RICHARD D. HOLCOMB,

11:05 a.m.

Defendant. March 25, 2019

TRANSCRIPT OF MOTION HEARING
BEFORE THE HONORABLE NORMAN K. MOON
UNITED STATES SENIOR DISTRICT JUDGE

APPEARANCES:

For the Plaintiffs:

JONATHAN TODD BLANK
McGuireWoods LLP
652 Peter Jefferson Parkway,
Suite 350
Charlottesville, VA 22911

LAURA ANN LANGE
McGuireWoods LLP
Tower Two-Sixty
260 Forbes Avenue, Suite 1800
Pittsburgh, PA 15222-3142

For the Defendant:

MAYA MIRIAM ECKSTEIN
Hunton & Williams LLP
Riverfront Plaza, East Tower
951 East Byrd Street
Richmond, VA 23219

NEIL KEITH GILMAN
Hunton Andrews Kurth, LLP
2200 Pennsylvania Avenue, NW
Washington, DC 20037

Court Reporter: Sonia Ferris, RPR, OCR
U.S. Court Reporter
116 N. Main St. Room 314
Harrisonburg, VA 22802
540.434.3181. Ext. 7

Proceedings recorded by mechanical stenography; transcript produced by computer.

THE COURT: Good morning.

Call the case, please.

THE CLERK: Yes, Your Honor.

This is Civil Action No. 3:16cv44, Damian Stinnie and others, versus Richard D. Holcomb.

THE COURT: Plaintiffs ready?

MR. BLANK: Yes, Your Honor.

THE COURT: Defendants ready?

MS. ECKSTEIN: Yes, Your Honor.

THE COURT: We'll take up the motion to dismiss first.

MS. ECKSTEIN: Thank you, Your Honor.

Maya Eckstein for the Commonwealth and the Commissioner.

The Court is very familiar with the case. It's written one memorandum opinion addressing the motion to dismiss. It's written another memorandum opinion addressing the preliminary injunction. As you may expect, we agree with one; we disagree with the other. The change in your thinking on some of those issues leads me to believe I might have an uphill battle today. I'm accepting the challenge and, hopefully, I can convince you with respect to some of these claims, at least, to dismiss them.

What I'd like to do to start is to set the table. We're here on a motion to dismiss to address the sufficiency

of the amended complaint. We're not addressing the evidence from the preliminary injunction hearing. We believe it would be inappropriate for the Court to consider that evidence on a motion to dismiss. If you do, however, consider it, we would like to remind the Court that some of that evidence is inconsistent with the very statutes that are at issue here, and also some of the forms, the summonses and the like, that are at issue here.

So this motion to dismiss addresses the statutory scheme that's at issue, and we must view those statutes together, not in isolation. So what I'd like to do first is to talk about that statutory scheme.

The scheme makes clear that with respect to fines and costs, the courts issue suspension orders, not the DMV. Section 46.2-395(B) explicitly states, "The court shall forthwith suspend" the driver's license.

Section C of that same statute states that, "Before transmitting to the commissioner of the DMV a record of the person's failure or refusal to pay, the clerk of the court that convicted the person shall provide written notice of the suspension of his license." Also, in Section C, it states that, "The suspension will be effective" -- "the suspension will be effective 30 days from the date of conviction if the fines and costs is not paid prior to the effective date of the suspension as stated on the notice that is provided. The

notice shall be provided to the person at the time of trial or shall be mailed to the person."

Section C also states that, "A record of the person's failure or refusal, and of the license suspension, shall be sent to the commissioner if the fines and costs remain unpaid on the effective date of the suspension specified in the notice or on the failure to make a scheduled payment."

So Section 46.2-395 makes clear that it is the court that suspends a license and that suspension occurs on the date of sentencing. It becomes effective 30 days later if the fines and costs aren't paid, but that suspension also occurs.

The statutory scheme also makes clear that notice and an opportunity to be heard are provided to these individuals regarding the availability of payment plans, community service, and even cancellation of the entire financial obligation, based on the person's financial condition.

Section 19.2-354.1(B) explicitly states that "The court shall give a defendant ordered to pay fines and costs written notice of the availability of payment plans and community service."

Section D of that same statute states that, "In determining the length of time to pay under a deferred" -- "modified, deferred or installed payment agreement, and the amount of the payments, a court shall take into account the

defendant's financial resources and obligations, including fines and costs owed by the defendants in other courts." Section D also states that, "The length of the payment agreement and the amount of the payments shall be reasonable in light of the defendant's financial resources and obligations, and shall not be based solely on the amount of fines and costs."

Then we also have Section 19.2-358(C), which states that, "If a person fails to make payments under a payment plan, and it appears that the default of the payment of fees and costs is excusable based on the inability to pay, the court may enter an order allowing the defendant additional time for repayment, reducing the amount due of each installment, or remitting, cancelling, the unpaid portion in whole or in part."

Now, all of this is also confirmed by the notices that are provided to defendants in these situations. Examples of those notices are attached to the plaintiff's amended complaint and original complaint. If the Court would like copies, I have copies here. In the amended complaint, Exhibit 3, we have the Virginia uniform summons -- may I pass one up?

THE COURT: You may.

(Said document handed to the Court.)

MS. ECKSTEIN: Again, this is Exhibit 3 to the

amended complaint.

In the bottom left there, there's a spot for the court to check "driver's license suspended effective in 30 days and fines and costs are not paid in 30 days." That is consistent with the statutory scheme that we've just discussed.

Similarly, Exhibit C to the original complaint -- and I'll pass up Exhibit C and Exhibit D to the original complaint.

(Said documents handed to the Court.)

Exhibit C to the original complaint is a suspension notice provided to the general district court at the time of sentencing, and at that time, you can see, midway through, it refers there to notification regarding suspension. "I acknowledge that I have been notified that my driver's license/driving privilege has been suspended or revoked for a period of," et cetera, et cetera.

At the bottom of that first page, there's a petition that the defendant can fill out there providing them an opportunity to petition for a payment plan or a community service. On the next page under part one, there, it provides a defendant explicit notice of the suspension and the process that he or she can use to attain a payment plan.

Exhibit D to the original complaint, which was also handed to you, is a similar form that's used in the circuit

court, which has all of that same information.

So now that we have that table essentially set, what I'd like to do is apply these facts to the five claims that we have here in the case.

Claim one is a due process claim. It's a facial challenge. As we've just gone through, notice and an opportunity to be heard are provided by the plain language of the statutes that we've gone through. The statutes are plain on their face. The notice is provided on a summons and at sentencing of the suspension that will become effective if fines and costs are not paid in 30 days upon payment according to a plan. The opportunity to be heard is offered at sentencing and at the multitude of times that a defendant can ask for a payment plan, community service or even complete cancellation of the financial obligation. The plaintiffs, to survive a facial challenge, must show that there are no set of circumstances under which the act would be valid. That's the U.S. v. Salerno case. They cannot do this, and they don't dispute that. They challenge the standard, but they don't offer a different standard. In fact, the Fourth Circuit has applied that standard, the Salerno standard, repeatedly. It did so as recently as 2016 in United States v. Hosford, 843 F.3d 161. This was a case involving the Second Amendment. It has cited the standard in Salerno in numerous cases since as well.

Admittedly, the Fourth Circuit has applied a different standard in abortion cases and that's because of a different standard the Supreme Court laid out in the Casey case and its progeny, but that's simply not applicable here. The plaintiffs cannot show there's no set of circumstances under which the act would be valid. They don't dispute this, and the claim should be dismissed as a result.

Now in claim one in this due process claim, they also present an as-applied challenge, and that challenge is based on the supposed need for pre-deprivation hearing, but one is provided here. A pre-deprivation hearing is provided at sentencing. Even if that wasn't the case, there is no constitutional requirement for a pre-deprivation hearing. The Fourth Circuit has explicitly stated as much in Tomai-Minogue v. State Farm Mutual Auto Insurance. That's cited in our brief. That's 770 Fd.2 1228. The Fourth Circuit in that case explicitly held that pre-deprivation hearings are not required for the loss of drivers' licenses. In that case, no pre-deprivation hearing was offered for the suspension of a driver's license for failure to satisfy a judgment. What was offered was an appeal after the deprivation, after the suspension. The Fourth Circuit in addressing that case applied the Matthews v. Eldridge factor, and the first factor, the private interest, the court held, "The private interest in a driver's license is not so vital

and essential as are social insurance payments on which the recipients may depend for his very subsistence. We do not disparage the importance of a driver's license in this day and time." It noted, though, the Supreme Court has "expressly held that the interest in a driver's license is not so great as to require a pre-deprivation hearing." And it cited Dixon v. Love for that proposition.

With respect to the second Matthews factor, the court held the risk of erroneous deprivation was small because either the defendant paid the judgment or didn't pay the judgment. The same is true here. Either the defendant paid the fees or didn't pay the fees according to a payment plan that took into consideration the defendant's financial resources.

The third factor, the government interest, the court held was hardly inconsequential. The aim is to ensure that motorists are financially responsible and will satisfy any judgement against them. Similar reasoning applies here.

Notably, the Fourth Circuit in that case, Tomai-Minogue, also held that notice was sufficient, even though the defendant in that case -- or the plaintiff in that case, did not receive notice until after the suspension went into effect. The plaintiff received prompt written notice of a suspension from DMV that informed her clearly of the reasons for the suspension and cited the statutory authority

for the suspension. The Fourth Circuit believed that to be sufficient. We have more than that here. We have notice before the deprivation. That case squarely applies here and requires dismissal of the first claim.

In the second claim, claim two, the plaintiffs allege a due process claim under this concept of fundamental fairness. That's explicitly how they allege that claim. But the fundamental problem with plaintiff's fundamental fairness claim is that the fundamental fairness analysis does not apply. They seek to apply the Griffin v. Illinois case in the Supreme Court, as well as related Supreme Court cases since then -- Williams, Tate, Bearden and Mayer -- but they don't apply here. Those cases all involve the loss of rights that the Supreme Court has declared to be fundamental, such as liberty in terms of imprisonment or incarceration, and the right of access to the courts. The Supreme Court has explicitly held that the right to drive or intrastate travel is not one of those fundamental rights, and that was in the Dixon v. Love case. Illinois law suspended the drivers' licenses of those who repeatedly were convicted of certain traffic offenses in a given period of time. The court applied the Matthew v. Eldridge test, not a fundamental fairness analysis that's set forth in Griffin and its progeny.

As the Fourth Circuit noted in Tomai-Minogue, and in

Dixon, the court held, "The private interest in a driver's license is not so great and that something less than an evidentiary hearing is sufficient prior to the adverse action." In applying Matthews v. Eldridge, it determined that the risk of error was small and the government's interest was significant.

That was the holding in a case recently in Oregon, Mendoza v. Garrett, and that's also cited in our brief. That case is very similar to this one in which the plaintiffs in that case challenged the license suspension statutory scheme in Oregon that is similar to the one here. That case was a preliminary injunction ruling in which the court held that the plaintiffs were not likely to succeed on their fundamental fairness due process claim because fundamental fairness did not apply, for the reasons I've discussed. That was also the holding in Fowler v. Johnson, which is also addressed in our brief. Again, that was a similar case challenging the suspension of licenses as a result of the failure to pay fines and costs. This is out of Michigan, and that was a preliminary injunction hearing as well where the court held that the plaintiffs were not likely to succeed on a fundamental fairness due process claim for the same reasons. As a result, claim two should be dismissed. Fundamental fairness simply does not apply.

Claim three, plaintiffs allege equal protection

claim, also fundamental fairness, and in the amended complaint, the plaintiffs assert the statute "punishes poverty," and they don't specifically refer to fundamental fairness in their complaint, but in their opposition brief, they make clear that's what they advocate should apply here, and they rely principally on the Fourth Circuit's opinion, Alexander v. Johnson. Alexander v. Johnson, though, was a fundamental fairness case in which the plaintiff challenged the statute that ordered a criminal defendant to repay the cost of court-appointed counsel or risk additional prison time. That fits squarely in the fundamental fairness analysis. You have the fundamental right of liberty to avoid incarceration at stake there. That's not what's at stake here. What we have at stake here is the loss of a driver's license, which may cause a significant burden, but it doesn't rise to the level of a constitutional fundamental fairness analysis. As a result, that claim should be dismissed as well.

With claim four, plaintiffs allege an equal protection claim under the rational basis analysis. With that application of fundamental fairness, the plaintiffs must allege, for this claim, discriminatory intent with respect to a suspect class and a disparate impact. They do not allege discriminatory intent. They refer in the complaint to the legislature having knowledge that the law, the statutory

scheme we have here in Virginia, does affect those individuals who do not have the ability to pay, but that is not evidence of discriminatory intent. It does not state the legislature -- and they do not allege -- that the legislature passed the law because of that effect on the poor. It says nothing other than the legislature passed that law in spite of that information.

The Fourth Circuit in Sylvia Development Corporation v. Calvert County Maryland explicitly explained that to prove that a statute has been administered or enforced discriminatorily, "more must be shown than the fact that a benefit was denied to one person while conferred on another. A violation is established only if the plaintiff can prove that the state intended to discriminate."

In addition to failing to sufficiently allege an intent to discriminate, the plaintiffs here do not allege the existence of a suspect class. As we've discussed, there is no fundamental right to a driver's license or the right to intrastate travel. As such, there is no suspect class here. The Fowler case out of Michigan came to the same conclusion and held that without a fundamental right of discrimination based on a suspect class, not even rational basis review applied to the case. As a result, that claim also should be dismissed.

Finally, we have claim five, the equal protection

claim, and this is where plaintiffs allege extraordinary collection efforts. The plaintiffs rely on James v. Strange, but that case doesn't support the claim. The debtors here are entitled to the same exemptions as any other debtors. No exemptions have been removed. In fact, the statutes here provide additional safeguards to debtors allowing for payment plans or even cancellation of the debt explicitly as a result of the debtor's financial circumstances. The fact that the Commonwealth has additional -- has an additional method of enforcement at its disposal here by suspending a driver's license does not lead to a different conclusion. The enforcement procedures need not be identical to be constitutional with respect to debtor to the state versus private debtors. All of the exemptions apply to these debtors as to any other debtor, and they have many opportunities to plead their case for payment plans and cancellation as a result of their financial circumstances, and that claim, thus, also must be dismissed.

Having addressed the claims, I want to address just briefly the other arguments that we've made in our brief regarding Rooker-Feldman, Ex Parte Young, standing, and joinder. I think I can address them all in one, frankly, and I know the Court has already ruled with respect to Rooker-Feldman, Ex Parte Young, and standing in conjunction with the ruling and, with respect, we believe that ruling is

in error.

The fundamental concept that runs through all of these arguments is that it is the court -- the courts that suspend licenses, not the DMV. The DMV, essentially, flips a switch. It gets information from the court saying a license has been suspended, fees have not been paid; therefore, we want it to reflect in the DMV record that the license is suspended. That is why under Ex Parte Young the DMV commissioner does not have the special relation to the challenged statute. The commissioner doesn't impose fines and costs and it doesn't order suspensions. It also doesn't remove suspensions. It can remove record of the suspension from the DMV record, but that is all the commissioner can do. The suspension remains in the court file. The driver's license remains suspended, according to the court. That order has not been lifted. That is why the traceability and redressability elements of standing haven't been met here and that's also why joinder would be appropriate of the circuit court and general district court clerks, but is not feasible, but they would be required parties here because only they can take that action that would be required. Accordingly, Your Honor, we respectfully ask the complaint be dismissed.

THE COURT: Thank you.

MR. BLANK: Good morning, Your Honor.

THE COURT: Good morning.

MR. BLANK: Jonathan Blank on behalf of Damian Stinnie, Melissa Adams, Adrainne Johnson, Williest Bandy and Brianna Morgan.

I won't take too much time, Your Honor. First, I'd like to make a couple introductory remarks. I'll start with October 2018, the Attorney General for the Commonwealth of Virginia.

In the context of the unconstitutionality of bail bonds, he said, "We cannot have a justice system that determines fairness based on wealth and means. That is wrong and unjust."

We agree with him. He went on to opine on the constitutional violations of such a system. Here, we have close to one million Virginians with suspended licenses based on a failure to pay a court debt because people are too poor to pay. We had 200,000 jail days last year because of a failure to pay court debt because people are too poor to pay. We have the same constitutional violations that the Attorney General spoke about with the bail bonds, and we have more. We have a constitutional crisis. This lawsuit -- this lawsuit is the vehicle to address those constitutional questions. It's the vehicle to address this constitutional crisis.

This Court shouldn't dismiss this case. This Court shouldn't dismiss any of these counts. This Court should let

this case go forward.

I'll touch briefly on the jurisdictional issues. They spent very little time because Your Honor ruled on them on Rooker-Feldman. It doesn't bar jurisdiction over plaintiff's claims. That's on page 9 of your opinion. Plaintiffs established their injuries fairly traceable to the commissioner, on page 11 of your opinion. The alleged injuries are reasonable, page 12 -- excuse me -- redressible, page 12. Because of the commissioner's obligations under 46.2395, he has the special relationship required by Ex Parte Young. Nothing that they said today, nothing they put in their pleadings, nothing that has been said so far should change your ruling or anything dealing with those issues.

Indispensable party. Turn quickly to that. Three salient points. The clerk's necessary. Are they indispensable? More important, for this, the burden is on the Commonwealth to prove both of those things. Not a shred of evidence. What proof? The only evidence you saw was at the preliminary injunction hearing. We put on the two clerks. They said they've got nothing to do with it. They keep talking about the court orders and the statute. You heard, and in this context you can rely on what was said at the preliminary injunction hearing -- not an order that was entered, not an order that was found. The clerks don't enter the suspensions. They want to talk about the statute. We

want to talk about what's going on in real life. We want to talk about what we pled in our complaint. That's the standard under 12(b)(6), an alternative. That's what this Court's asked to do. The standard 12(b)(6) motions should only be granted when the complaint does not contain sufficient factual matters accepted as true to allow the court to draw reasonable inferences that the plaintiff cannot prevail. The Commonwealth never even talked about what we pled in the complaint. They want to go to these constitutional principles that I'll be glad to address, but go back to the complaint, and it is crystal clear that we alleged facts to support each one of these counts. A violation of procedural due process based on lack of availability to pay. Count 1. We alleged a person's driver's license is a property interest. We alleged the plaintiffs did not receive a pre-deprivation hearing. We alleged the plaintiffs were not afforded notice of a pre-deprivation hearing. We allege the plaintiffs were not afforded a pre-deprivation hearing. That's all that's needed. The complaint is chock-full of these specific allegations.

They want to talk about Salerno and Tomai. First of all, the exclusive procedural safeguards they're talking about in Salerno -- they don't exist. Tomai -- that's talking about a case that deals with specific safety concerns

on the road. We're not talking about safety concerns on the road in Tomai. We're talking about, here, an automatic license suspension that the commissioner puts in place. That's what we're talking about.

Count 2, a violation of due process based on fundamental fairness for punishing people because they are too poor to pay. We alleged 46.2395 punishes a person based on his or her inability to pay rather than willful refusal to pay. We allege that each of the plaintiffs are willing to pay, and we alleged that each of the plaintiffs cannot pay. That's all that's needed. That's all that's needed.

We do rely on Bearden and I ask the Court to go back and look at Bearden and these cases. They support, if you want to look at the law, every single thing that we have said as a factual matter in the complaint.

Count 3, a violation of equal protection clause. The Code is set up to treat people not in poverty differently than those in poverty. Again, plaintiffs are too poor to pay. The plaintiffs are too poor to pay and the plaintiffs are being treated differently than people that are not too poor to pay. If that is not the case, again, put yourselves in the same situation. If you had a traffic offense, which I have, am I being treated differently than Adrainne Johnson? Of course I am. Is Adrainne Johnson being treated differently than me? Of course she is. That's what we

allege in the complaint. That's all that we need to allege at this point. Let us have the chance to prove it.

We don't need to prove discriminatory intent, but my colleague said we didn't allege it. Paragraphs 60 and 61 is enough for the allegation with inferences held in our favor to prove that we alleged the discriminatory intent. We don't need to even allege that here, but we have.

A violation of due process clause -- there's no rational basis for suspending people's license for nonpayment. We alleged the plaintiffs' licenses were automatically suspended when they didn't pay. We allege the license is the protected property interest. We allege the plaintiffs' license is essential to their livelihood. We allege there's no rational basis to motor vehicle safety and automatic suspension of license. We allege the commissioner's on the board of the national organization, AAMVA, that studied the issue and found there's no rational basis. We allege there's no rational basis to incentivize payment by automatically spending licenses. We allege that suspending licenses makes it less likely for those who have fines to pay them. Again, that's all that's needed at this stage.

Count 5, equal protection clause -- because the state of Virginia is using a collection mechanism that a private creditor may not use. They say that we didn't meet the

allegations needed for James v. Strange; it's not about exemptions. That's not what James v. Strange is talking about. That's not what we alleged. We alleged that the Commonwealth, through the commissioner, is using a coercion of automatic driver's license suspension to collect a state debt. That's what we alleged. It's not about an exemption. It's about what the state can do. It's what the state can do that a private collector can't do. Here, the state is using the technique of suspending people's license to collect a debt. Private creditors can't do that, and the concept of it -- the concept of it -- to think you're going to coerce somebody by taking away their license so they can't drive to go to work, to make the money, to get the money to pay the debt -- again, it's crazy, and it's not constitutional.

Back to this argument that Bearden only applies to incarceration -- that's just not correct. That's not correct. Mayer v. City of Chicago, that didn't have anything to do, again, with the incarceration. There was no jail time. It was talking about a free trial transcript. Jail time wasn't the only -- because you have the threat of incarceration. That's not what this is about. But here, we do have threats of incarceration. People are threatened by the fact that they could go to jail if they don't pay their fines on time. They are threatened because we know that people have gone to jail.

So Your Honor, with all due respect, we are at a 12(b)(6), 12(b)(1), 12(b)(7) stage. The 12(b)(1), Your Honor already ruled on. The 12(b)(7), they've put absolutely no proof forward; and the 12(b)(6), we have alleged all the allegations that are necessary to move this case forward and we should do so expeditiously so we can deal with one of the worst statutes that's in the Code of Virginia today.

Thank you, Your Honor.

THE COURT: Go ahead.

MS. ECKSTEIN: Just a couple points, Your Honor.

My colleague mentioned the various allegations in their amended complaint, went over numerous allegations. But you have to have allegations that fit within the law. They haven't done that here.

I didn't hear a word about Dixon v. Love, a seminal Supreme Court case that held there's no fundamental right to drive, to a driver's license or to intrastate travel. They don't address the Salerno standard. They didn't address it here. And they didn't address the fact that in Tomai-Minogue, the court held that a pre-deprivation hearing was not required for the loss of a driver's license. You have to have allegations that fit within the law. They don't have that here.

I'll make just one final point with respect to fundamental fairness. My colleague made a point that Mayer

-- the case in Chicago did not involve jail time but a free transcript. I also mention access to the courts haven't been found as a fundamental right by the Supreme Court, and found that fundamental fairness does apply to cases involving access to the courts as well as to incarceration. He also mentioned that, here, in this case, we also have people who are threatened with jail time and so, therefore, Bearden and the other cases should apply. That is nowhere in the complaint. Nowhere in the complaint do any of the plaintiffs at issue here allege that they have been threatened with jail time because of their failure to pay fines and costs.

Thank you.

THE COURT: Let me ask you one thing.

Would you just sort of walk me through what would happen if one was convicted of an offense who was too poor to pay the cost? Just what would take place in the court, courtroom and up until the time the license was suspended, what they could do to prevent that? They can't pay, but what could they do, and what notices would apply to prohibit the license from being suspended?

MS. ECKSTEIN: Right.

So upon conviction and sentencing of the underlying offense, the fees and costs are assessed in open court at that point, and then also with the form that the individual is provided. So the notice and an opportunity to be heard

are provided at that point. At sentencing, the individual can say, I cannot pay this. And, in fact, on the suspension notice that I handed up to the Court from the general district court and the circuit court, there is a space on there for a petition to be filed requesting a payment plan, requesting even cancellation of the entire financial obligation as a result of the person's individual financial circumstance.

THE COURT: Does the judge advise them at that time? I haven't been in general district court for years, but when the judge finds somebody guilty, fines them $50 and imposes costs, what -- who tells them what at that time?

MS. ECKSTEIN: So at the time that they receive the document stating the suspension, it states on there explicitly that they are able to ask for the reduced obligation or a payment plan. It is right there. Many of the judges have --

THE COURT: I mean, I'm just -- so they're expected to read this when they're convicted.

MS. ECKSTEIN: Different courts handle it differently. Every circuit court and general district court can handle it in the plan they have set out, which the statutes require them to set out, and the Virginia Supreme Court rule has set out to make sure the individual does receive notice, including all of the options that are

available to them. So they do receive that notice at that time. They also have the opportunity to come back to the clerk -- in most cases, the clerk. In other cases, it could be the judge, depending on the process set up in each court -- to come back and to say, I need a payment plan; here are my financial circumstances; what can we do? Or, I would prefer to do community service.

THE COURT: Where does the statute give them -- some courts might not -- do it differently and some might omit something. How does the statute work?

MS. ECKSTEIN: So 19.2-354.1(B) specifically states that, "The court shall give a defendant ordered to pay fines and costs written notice of the availability of payment plans and community service." Then the Supreme Court rule, 1:24, I believe it is, says the same thing and requires the courts to set up processes for that.

Then 19.2354.1(D) specifically states that, "In determining what the payment plan should be, the court shall take into account the defendant's financial resources and obligations." So that's provided for in the statute. Even the length of the payment plan or the amount of the payments have to be reasonable, "in light of the defendant's financial resources and obligations." So the statutes set out that the courts have an obligation to provide this notice to the defendants.

THE COURT: The court gives -- I take it it's not a verbal thing. They give them the papers.

MS. ECKSTEIN: I think it's different in every court, but they do give them the papers. The statute requires written notice, but as to whether courts provide verbal notice, I think that varies.

THE COURT: So, say the person, 15 days later, runs into a government shutdown and doesn't get their check. What can they do at that point?

MS. ECKSTEIN: They can go back to the clerk and explain the situation and ask for a changed payment plan. They have that opportunity.

THE COURT: How do they know to do that?

MS. ECKSTEIN: The notices tell them they can ask for payment plans.

THE COURT: The notice they're handed at the time they're convicted.

MS. ECKSTEIN: Yes, sir, as well as the statutes on their face.

THE COURT: Are they entitled to a hearing? What says they're entitled to a hearing before --

MS. ECKSTEIN: Well -- sorry.

THE COURT: No.

MS. ECKSTEIN: At the time they go to the clerk and say, I need a new payment plan because the government is shut

down, or whatever has happened, the clerk is required to consider their financial circumstances in setting up --

THE COURT: And the clerk decides that?

MS. ECKSTEIN: In some jurisdictions, it is the clerk. In other jurisdictions, I think it is the judge.

THE COURT: How quickly -- what if the clerk doesn't do anything before the end of the 30 days?

MS. ECKSTEIN: So at this point, we're going outside of the record, obviously, outside of the complaint. My understanding is that the clerks typically do it at the time that the request is made, and the statutes require the clerks to do it. The statutes do not set out, as far as I can recall, a time period for doing it. I'm not aware of any allegation here that any of these plaintiffs defaulted because the clerk didn't make a timely decision.

THE COURT: Okay. I'll allow Mr. Blank to speak to that. I should have asked you earlier.

MR. BLANK: Your Honor, you could tell I was itching to get up.

This is what Ms. Ciolfi was talking about at the preliminary injunction hearing. This is T-1 versus T-2. T-1 that they want to focus is at the time of the conviction or even at the time of the payment plan. That's not what this case is about. This T-2. This is time of default. This is the time when commissioner checks it's suspended. It's T-2.

There is no notice before the automatic suspension. There is no notice before the automatic suspension. There is no pre-deprivation hearing before the automatic suspension. There is nothing in the Code that says, Hey, if you want to take somebody's license before you automatically suspend it, you have to give them notice and you have to bring them in. That's the problem with the statute. That's what makes this statute unconstitutional. The check happens; the commissioner suspends. Nobody calls these people back in. Nobody gives these people notices, and it is in our complaint. It is in the complaint.

THE COURT: If the defendant was knowledgeable of what's contained in the form, could the defendant who's unable to pay prevent --

MR. BLANK: No. Your Honor, the answer is no. And more importantly what's in the form talks about a payment plan, possibly. Again, I'm not even sure they're talking about the right thing, but even if there's a notice at the time of conviction -- 20 days, 40 days, 60 days, 100 days, 120 days, 300 days beforehand -- that's not enough before you automatically take it if they default and the commissioner then suspends automatically because of the computer system. That's not enough. It's constitutionally deficient because they do not give that person the notice. As you said, there are all these things that could happen: Government shutdown,

somebody gets in an accident, somebody gets sick and is infirmed -- the myriad of things we go through in everyday life. There's nothing that comes back to that person before you suspend, and there is no process that the commissioner has to say before you suspend, this is what we're going to do, and have a pre-deprivation hearing. That is the problem. They're talking about T-1. We are talking about T-2. Two different points in time.

I don't know if that answers your question. The only thing I would say about the jail time, at least one, and I think, frankly, two of our plaintiffs served jail time. So it's in the complaint with the inferences most considered towards us.

THE COURT: I'll allow you to speak -- just comment -- since you get the last word, on that point.

MS. ECKSTEIN: The notice and the pre-deprivation hearing are provided at the time of sentencing. That is when notice is provided that the license, in fact, is suspended -- already is suspended. The suspension will go into effect within 30 days or upon a default in payment. That is when the notice and opportunity to be heard are provided.

THE COURT: What if the person just says, Look, I have no means to pay. There's no way that I could ever come up with the money. Does the clerk -- they can't abate the fine or costs, can they?

MS. ECKSTEIN: Yes. The statutes explicitly allow the clerk or the judge to explicitly cancel the financial obligation. I think the word that's used is remit. They can order community service instead of the fine, and the statute requires --

THE COURT: What about the costs?

MS. ECKSTEIN: The costs and fines, yes.

The statute specifically states that that decision has to be made based on the individual's financial circumstances.

MR. BLANK: Your Honor, I have to correct the record on one thing, and I don't mind if Ms. Eckstein responds, but the issue on whether or not -- a cancellation of debt, it's a show cause hearing, and, again, it's available on motion of the court or Commonwealth. It's not correct to say that a clerk can do that.

MS. ECKSTEIN: The show cause hearing is provided for in the statute for when the person will face jail time. That's the way the statute is worded. It specifically refers to show cause for incarceration for failure to pay fines and costs.

THE COURT: Thank you.

Now we'll hear the motion to certify class.

MS. LANGE: Good morning, Your Honor.

The plaintiffs seek to represent two classes of

individuals whose licenses have been or will be suspended automatically due to the failure to pay court-related debt. Defendant, Commissioner Richard D. Holcomb, carries out the suspension process under Section 46.2-395 of the Code of Virginia without notice, without a hearing and without consideration of these persons' inability to pay. Each of these failures constitutes a violation of plaintiffs' and the class members' constitutional rights. Every class member has been or will be subjected to the commissioner's uniform practice. Because of the uniform practices in implementing Section 46.2-395, Plaintiffs Damian Stinnie, Brianna Morgan, Melissa Adams, Adrainne Johnson, Williest Bandy, and hundreds of thousands of Virginia residents like them have lost their licenses.

Plaintiffs seek to certify two classes: First, the suspended class, which includes all persons whose driver's license are currently suspended due to their failure to pay court debt pursuant to Virginia Code Section 46.2-395. In addition, the future suspension class seeks to encompass all persons whose driver's license will be suspended due to their failure to pay cost debt, pursuant to Section 46.2-395. Plaintiffs in the classes seek a declaration that Section 46.2-395 of the Virginia Code is unlawful and violates their and their class members' rights under the Constitution and the laws of the United States; an injunction to enjoin the

commissioner from enforcing Section 46.2-395 against plaintiffs and the members of the class; to remove any suspensions imposed pursuant to Section 46.2-395 and the plaintiffs' suspended class members' driving records; and to enjoin the commissioner from charging a fee to reinstate plaintiffs' and suspended class members' licenses if there are no other restrictions on their licenses. Both proposed classes meet the certification requirements under Rule 23.

The defendant did not appear to challenge the numerosity and adequacy elements of Rule 23 so I'll touch upon those briefly at the outset.

First, with respect to numerosity, the Commonwealth's own records, their own statistics, demonstrate that at any particular time, hundreds of thousands of individuals have their licenses indefinitely suspended for failure to pay court debt. Almost a million people have had at least one suspension for court debt as of January 2017. Governor McAuliffe stated that nearly 650,000 Virginia residents currently have a suspended driver's license because they cannot afford to pay their legal fees and court costs to the state.

With respect to adequacy; the representative plaintiffs do not have any conflict with the other members of the class, and there has not been any showing of any conflict with the other members of the class. The named plaintiffs

are knowledgeable of the facts of this case and they are dedicated to actively participating in this case on behalf of all Virginia residents. Therefore, we think that both the numerosity and adequacy prongs of Rule 23(A) are met.

Now, turning to commonality. Where, as here, the plaintiffs' claims and class claims are challenging an agency's uniform and generally applicable systemic practices, commonality is met because the defendant's actions are the focus. They're central to the claims of all class members. As this Court previously explained in an analogous situation, suits seeking injunctive relief, by their very nature, present common questions of law and fact.

The commissioner in this case has a uniform policy of issuing license suspensions for nonpayment once it receives a computerized transmission. Every one of the members of the proposed class is equally subject to Section 46.2-395 at the time they default on payments owed to the court. Resolving the questions of whether the process violates the plaintiff' constitutional rights is central to the lawsuit. If resolved for the plaintiffs, it establishes the need to cease the practice and remove the unconstitutional impediments on their licenses. If resolved against the plaintiffs, it holds the policy as it currently exists. The point is, the claims all derive from the same common practice. Therefore, commonality is met.

With respect to typicality, plaintiffs in each class matter are subject to the suspension, either in the past or in the future, for nonpayment of court costs pursuant to Section 46.2-395. Plaintiffs in each class member will benefit in the declaration that Section 46.2-395, including the commissioner's implementation of it, is unconstitutional. Plaintiffs Bandy and Johnson and each future class member will benefit from an order prohibiting further injunctions -- further suspensions -- sorry -- under Section 46.2-395. Plaintiffs Stinnie, Morgan and Adams, and each suspended class member will benefit from an order requiring the removal of any suspensions imposed pursuant to Section 46.2-395 from the driver's license, and an injunction prohibiting the commissioner from charging a fee to reinstate those members' license if there are no other restrictions on their licenses. The plaintiffs are typical of the class.

Turning to Rule 23(b). Here, plaintiffs seek injunctive and declaratory relief under Rule 23(b)(2). That is operative when the party opposing the class has acted or refused to act on grounds that apply in general to the class, so that final injunctive relief or corresponding declaratory relief is appropriate, respecting the class as a whole.

Certification is appropriate here. The claims rest on the defendant's conduct, which is based on policies and practices applicable to the entire class. Members of the

respective proposed classes face the same risk of harm: either the future or current unconstitutional deprivation of their driver's licenses. The harm results from the DMV's enforcement of the same statutory tax, Section 46.2-395, which equally applies to all members.

The relief sought will benefit all class members. A declaration that Section 46.2-395 and the commissioner's associated practice of automatically issuing license suspensions for nonpayment, without notice or an opportunity for a hearing, is unconstitutional. An injunction requiring the commissioner to cease enforcement of Section 46.2-395 and to remove the wrongful suspensions from the plaintiff's and suspended class members' licenses.

As the Supreme Court, the Fourth Circuit, and all the treatises on class actions have explained, actions brought for injunctive relief alleging civil rights violations are precisely the type of suit that Rule 23(b)(2) is designed for. Because the focus of this case is on the statutory scheme, and the defendant's conduct and the class seeks uniform injunctive and declaratory relief, class certification is proper here.

Thank you.

MR. GILMAN: Good afternoon, Your Honor. Neil Gilman for the commissioner.

I want to start by addressing Counts 2 to 5, which

are plaintiffs' as-applied challenges, and then I'll turn to the facial challenge in Count 1.

We demonstrate in our brief why a class that requires proof of financial circumstances for each class member can't be certified. Plaintiffs don't really challenge that analysis in any way and, in fact, I think they probably agree with it. Instead, what plaintiffs seem to argue is that the -- is that we misconstrue their claims. They say at page 4 of the reply brief -- and they say it in other places as well, Your Honor -- but it's pretty clear there, that they're claiming the statute is unconstitutional for everyone, "regardless of their financial circumstances." Again, we're talking here about their as-applied claims. So I'm going to point to four pieces of evidence and after the argument this morning, maybe even a fifth, that show this is incorrect and the plaintiffs are trying to recast these claims because they know they can't be certified -- they know the as-applied claims can't be certified.

First, Your Honor, at the February 2, 2017, hearing on the motion to dismiss, plaintiffs' counsel made perfectly clear that ability to pay is crucial to their as-applied claims. At page 61 of the transcript, Ms. Kendrick says that this case is an as-applied challenge, "on behalf of an enormous plaintiff class as to whom the law is unconstitutional." Not as to everyone, Your Honor, just

those for whom the law is unconstitutional. If that left any doubt, Your Honor, about plaintiff's case, it then became perfectly clear with the next sentence, which counsel said, and I quote -- this is a direct quote. "The law is constitutional when it comes to people who are able to pay. It's unconstitutional when it comes to people who are unable to pay."

Your Honor, that's basically our entire argument against class certification of Counts 2 to 5. The plaintiffs seek to include in the class people whom they admit the law is constitutional for. The Supreme Court says in Dukes and Jennings, you can't do that. You can't have a (b)(2) class where the conduct isn't unlawful as to all class members. It's black letter law from the Supreme Court and, again, that's Dukes and Jennings. Now, that hearing was a little more than two years ago. The other pieces of evidence are much more recent.

The second piece is plaintiffs' amended complaint, which makes it clear that Counts 2 to 5 only apply, "to those who cannot pay." We cited the paragraphs in our brief and include paragraphs 338, 346, 356, 357, 359 and 363.

Third, the named plaintiffs themselves testified that those who can pay but choose not to are not part of the class they seek to represent. We cited that testimony in our brief -- I think it was four or five -- and counsel told you

earlier in her argument that these plaintiffs were adequate because they were knowledgeable about the case, and engaged. Yet, they don't think they're representing people who can pay. But yet, those people are still included in their class.

Fourth, plaintiffs said it in their motion for class certification. They say the named plaintiffs will provide evidence of four things. This is at page 21 of their brief. They say that this evidence is "identical to what other class members would proffer." And the second bullet -- they list four bullets of what they're going to prove. The second bullet, is "that she or he was unable to pay those costs." In other words, they're going to come up and prove a bunch of things, including inability to pay.

Your Honor, there simply can't be any dispute that the plaintiffs consistently recognize the need to prove ability to pay as part of their case, and it's really obvious, and, again, I think it's really undisputed that ability to pay is a highly individualized issue that can't be adjudicated on a class-wide basis. You're not going to come into this court and adjudicate hundreds of thousands of -- make hundreds of thousands of ability to pay determinations.

You know, finally, there's no dispute that the class definition includes people who can pay and people who can't pay. In other words, the class is way overbroad and it can't

be certified as to those claims.

Again, I don't really think that the plaintiffs disagree with any of that. So what do they do? They try to redefine their claims. They now argue all their claims are, "process claims," and, again, that's at page 4 of the reply brief. But that's not what they said. That's not what they pled. Let's look at Count 2, for example. If you look at the complaint, Count 2, the claim is that the statute is "fundamentally unfair." It "punishes individuals solely for his or her inability to pay." It's not a process claim and I think the motion to dismiss argument this morning -- earlier this morning -- made that clear.

The other counts are similar. It really makes very little sense to argue that these as-applied claims are process claims. Count 1 is the facial challenge. If the plaintiffs can't show that the statute is facially invalid, which means unconstitutional in every possible application, I don't understand how they can show that it's unconstitutional as applied to everyone. If they can show facial invalidity, I don't see what an as applied, "process claim" adds, in any event.

So for those reasons, Your Honor, we think that Counts 2 to 5 cannot be certified.

THE COURT: Thank you.

MR. GILMAN: So let me turn to Count 1.

Now, there are a lot of reasons certification could also be denied here. We explained in our brief, Your Honor, that this case doesn't really present an appropriate facial challenge for certification because of different factual circumstances. The key one is notice. I was going to get into the notice discussion a little bit, but I think that was really well played out is -- how the notice -- and Your Honor's questions about the notice really go to what happened to this person? What happened here? What is the court in Charlottesville to do, which they put in evidence on. What does a court somewhere else do that they don't, meaning -- I think what that discussion really showed is that you can't come to a single determination on what happened with notice, how the notice was applied and whether it's constitutional in all circumstances. I think you really need -- I think as Ms. Eckstein showed, I think the complaint should be dismissed because it doesn't state a claim, but if you let the complaint go forward, I think that the discussion this morning showed why you can't just say, in one fell swoop, yes, notice was fine, no notice was not fine, as to every court, every judge, every clerk, every county, et cetera.

So there's that. Then, Your Honor, there's only one last thing I'd like to add. In a case that was decided after the briefing in this case closed, the district court in Montana, Judge Hadden, faced a very similar issue that Your

Honor faces, and it's the same case involving the Montana statute at issue -- the Montana version of the statute here. What that court held was to the extent that an injunction would apply to everyone, it makes no sense to certify a class because certifying a class has administrative problems and complexities that aren't needed when an injunction for one person, which would be, I guess, the case in a facial invalidity challenge, would apply more broadly. So let me just cite that case. It's DeFrancesco v. Fox. It's No. CV-17-66-EU-SCH, and again, that's Judge Hadden from the District of Montana, and the decision was on January 9, 2019.

The Court denied certification because it found that, "All potential class members in this case would benefit from an injunction issued on behalf of the individually named plaintiffs."

THE COURT: Is he speaking only of a facial challenge?

MR. GILMAN: It's unclear from the decision, Your Honor. It's a short decision. Actually, I have an extra copy I could hand up at the conclusion of argument to make it easier for the Court. But it would have to be, I think, because it would only be an as-applied -- as-applied --

THE COURT: I think it would have to be only facial.

MR. GILMAN: I agree with that, and that's why I'm addressing that in the context of Count 1, which is

plaintiffs' facial challenge. I think Counts 2 to 5 should be denied for all the reasons I said about the ability to pay. Count 1, to the extent the Court feels it's a true facial challenge, that should go forward, but I think that the Montana decision would apply.

THE COURT: Okay.

MR. GILMAN: Thank you, Your Honor.

THE COURT: Thank you.

MS. LANGE: Your Honor, I want to start with the last point first, the Montana case, and then work my way backwards.

First, with respect to that decision, it was clear that the injunction was going to benefit -- it was going to cease all operations of enforcing that statute if the Court ruled in favor of the plaintiff. But also, the treatises disagree with that approach. Newberg on Class Actions says that when 23(b)(2) circumstance are present, unitary adjudication is not only preferable, but it is also essential.

We need to have this determination be applied across the board. There's no reason to limit it to just the named plaintiffs in this case. If their conduct is determined to be unconstitutional, certifying a class and enforcing that as to the class will provide the appropriate remedy.

Looking at the facial challenge itself, what they

refer to -- the individualized hearings they believe is going to be paraded through this courthouse, that is again relying on the misconstruction of our claims. We're focusing on what Mr. Blank referred to as type two, when there is no notice, no hearing and no ability to pay. The suspensions occur automatically after default. It doesn't matter what happened prior to that default. As you said earlier, maybe a person was able to pay days 1 through 15, but then their job was furloughed. They were not able to get those government checks or they lost their job. Circumstances change, and that is why it's important at the time of default that consideration is taken into account of their ability to pay and that notice is provided in a hearing at the time of default, and that is the focus of our claim. When that occurs, the conduct on behalf of the commissioner is uniform. They get the electronic transmission that default has occurred and the license is suspended. No notice is provided to the individuals. No hearing is provided and no ability to pay is taken into consideration.

With respect to Counts 2 through 5, they say that proof of financial circumstances is necessary. If you look at -- I will agree that for an equal protection determination, which we have pled, and which our named plaintiffs will be able to prove, and which Adrainne Johnson has already testified to before this court of her inability

to pay -- that that fact will come into play. But what you look to with certification is what is the form of relief that is being requested, and does that apply uniformly across the board. And it does. Every single Virginia resident, whether they're well off or not in great financial circumstances, has the right to receive notice, a hearing, and an ability to pay determination, because circumstances change. We don't know who is going to be able to make those payments on day 30 or day 29 or day 120. Those circumstances change, and so that's why before the deprivation happens, we need to make that assessment.

Here's the other thing. We had Dr. Peterson testify at the preliminary injunction hearing, and his expert testimony showed that this statute disproportionately affects poor people. The Commonwealth -- Governor McAuliffe has himself said that 650,000 individuals had their driver's licenses suspended because of their inability to pay -- their inability. Yes, that is the focus, that is the reason for this lawsuit to exist, is to protect -- or those counts, I guess. But everybody can fall into that bucket. Everybody can get the relief we request. If a constitutional process is put in place and an ability to pay hearing is afforded, only the poor people are actually going to have that benefit of the determinations. But none of that has to happen before this Court. All that has to be determined is whether the

process in place right now is constitutional or unconstitutional. And our position is it's unconstitutional and we need the relief from you to give it class-wide effect.

Another point is that courts are uniform that individualized hearings or determination that every class member is injured is not necessary for a (b)(2) certification. Again, the focus is on the remedy that the class is seeking and whether that will have uniform application; and here, it does. We set that out in the briefs.

This case reminds me of the case that was before Your Honor a few years ago, Harris v. Rainey, which was dealing with individuals who -- at a prison -- female prison population -- who were having insufficient medical treatment. Not every single person in that prison population necessarily had gotten sick or injured and needed to get that medical treatment, but what was important was putting in place sufficient medical treatment in case those individuals do become injured or sick so that they can get the appropriate medical treatment. That is exactly what's going on here. Maybe right now, not every single Virginia resident will take the benefit of having an inability to pay hearing, but they need to be given that opportunity should their circumstances change.

Again, the focus here -- just one point I want to

make about the reference to Counts 2 through 5 is if you look at what the remedy is afforded in the Bearden case, it is all about putting in place the process, putting in place the inability to pay hearing, and you need to do that across the board, and that's why our class includes everybody that can face the suspension scheme under Section 46.2-395.

I have nothing further, Your Honor.

THE COURT: Thank you.

If that's all then -- thank you all.

MR. BLANK: Thank you, Your Honor.

THE COURT: Recess.

Ms. Eckstein: Your Honor, may I pass up the Montana case my colleague referenced?

THE COURT: Yes, please.

(Said document handed to the Court.)

(Proceedings concluded at 12:19 p.m.)

"I certify that the foregoing is a correct transcript from the record of proceedings in the above-entitled matter.

/s/Sonia Ferris June 3, 2019"